

NO. 48815-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WALLACE TOMLIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 15-1-03272-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When the evidence presented firmly supports the conclusion that defendant intended to spit in a nurse's face who was treating him, should the court reject defendant's claim that there was insufficient evidence supporting his conviction for Assault in the Third Degree?
2. Does this Court have discretion to award appellate costs to the State if it prevails in this appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On August 19th, 2015, the Pierce County Prosecuting Attorney charged Wallace Tomlin, Jr. (defendant) with one count of Assault in the Third Degree (Count I) by Information. CP 1. The Honorable Frank E. Cuthbertson presided over the jury trial. 1RP 1. The jury found defendant guilty on Count I. CP 22. The trial court imposed an exceptional downward sentence of 15 days with 15 days credit for time served. CP 37, 40. The court based the downward departure on defendant's diminished capacity to "appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law." CP 50. The court imposed \$800 in mandatory legal financial obligations while waving all discretionary LFOs. CP 38-9.

2. Facts

On August 18th, 2015 Luisa Pedro, defendant's fiancé, called 911 to report that defendant left their house following a domestic argument and

said he was walking to the Tacoma Narrows Bridge to commit suicide. 3RP 194-5, 215-7. Tacoma Police found defendant on the pedestrian walkway at the base of the Narrows Bridge, intercepted him, and transported him to St. Joseph's Hospital for evaluation and treatment. 2RP 66-7; 3RP 195.

Upon arrival at the hospital, defendant acted in a bellicose and hostile manner. He threatened the officers monitoring him by telling them "I could kill you if I wanted to." 2RP 197-8. He yelled and threatened medical staff. 2RP 78, 128-9. Nurse Anna Zinchenko was assigned to perform required medical procedures on defendant including a blood draw, assessment of his vital signs, and taking a urine sample. 2RP 68-72. Defendant refused to cooperate with Nurse Zinchenko and verbally threatened her. 2RP 78-81. Defendant's belligerent and unruly behavior required hospital security to restrain him to gunnery to allow Nurse Zinchenko to perform the required procedures. 3RP 158-9.

While Nurse Zinchenko attempted to draw blood from defendant's arm, she witnessed him gather spit in his mouth by clearing his throat, look directly at her, and blow a "big chunk" of spit in her face and on her hair. 2RP 83-4, 103. As she left the hospital room to clean herself, hospital security restrained defendant's head and placed a "spit mask" on him. 2RP 133. She testified the incident was distinctly different from incidents when patients accidentally spit on medical personnel due to the circumstances of their treatment. 2RP 103. Nurse Zinchenko described the event as "the most

disgusting thing anybody's done to me in my whole life." 2RP 87.

Defendant filed a timely appeal. CP 52.

C. ARGUMENT.

1. THE STATE'S EVIDENCE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, ALLOWS A REASONABLE JURY TO FIND DEFENDANT GUILTY OF ASSAULT IN THE THRID DEGREE.

For a court to find there was sufficient evidence for a conviction on review, it must determine, after viewing the evidence in the light most favorable to the State, any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201. Deference must be given to the trier of fact who is responsible for determining witness credibility, resolving conflicting testimony, and evaluating the persuasiveness of evidence presented at trial. Const. art. I, §21; *State v. Furth*, 5 Wash.2d 1, 104 P.2d 925 (1940)("Courts cannot trench on province of jury upon questions of fact under [Const. art. I, §21]."); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Credibility determinations are for the trier of fact and cannot be reviewed

on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Defendant claims the State failed to prove defendant acted with the requisite intent to convict him on Count I. Brief of Appellant at 7. Defendant was convicted on Count I for assaulting Nurse Zinchenko. Assault was defined to the jury as:

[A]n intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touch or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the act did not actually intend to inflict bodily injury.

CP 16

Defendant's challenge is only concerned with the intent element—that he did not intend to spit on Nurse Zinchenko. The court instructed the jury that a person acts with intent when he acts “with the objective or purpose to accomplish a result that constitutes a crime.” CP 16. His challenge fails because the evidence presented, when viewed in the light most favorable to the State, allows a reasonable jury to find he intentionally spit in Nurse Zinchenko's face.

Defendant argues that the evidence supports a reasonable inference that he did not intend to spit in Nurse Zinchenko's face. Brief of Appellant at 8. But applicable standard of review requires that all evidence be viewed in the light most favorable to the State, not the defendant, and accords great deference to jury determinations inferred from the evidence. *State v. Green*, 94 Wn.2d at 220-22; *State v. Camarillo*, 115 Wn.2d at 71; *State v. Carver*, 113 Wn.2d at 604.

Defendant's sufficiency claim is defeated because when the evidence is viewed in the light most favorable to the State, the reasonable inferences establish he acted with the required intent.

Defendant entered the mental health ward of St. Joseph's Hospital where he became aggressive, threatening, and uncooperative towards medical personnel, police, and hospital security. *See e.g.*, 2RP 66-7, 72-81, 128-9, 195-8. Hospital security restrained him to a gurney to allow Nurse Zinchenko to administer required medical tests. Nurse Zinchenko testified that as she attempted to draw blood from defendant's arm, he looked at her, cleared his throat to make a large spitball, and spit directly into her face and hair. 2RP 83-5. Hospital Security Officer Michael Norrland testified he saw defendant sit up to better aim his spitball at Nurse Zinchenko. 2RP 133-4. Following the spitting incident, security restrained defendant's head long enough to place a "spit mask" on his face and a chest restraint. 2RP 133-4, 158-9.

Testimony that defendant waited until Nurse Zinchenko was close to his face, looked directly at her, gathered spit in his mouth, and blew a “big chunk” of spit in her face was sufficient evidence for the jury to find he intended to spit on Nurse Zinchenko. Nurse Zinchenko contrasted defendant’s behavior with “whiplash” incidents that occur when a patient involuntarily spits on medical personnel due to their treatment. 2RP 103. During involuntary salvia “whiplash”, the patient does not gather a spit ball and aim it directly at the attending staff’s face. *Id.*

Michael Norrland’s testimony and security’s subsequent reaction further indicates defendant intentionally spit on Nurse Zinchenko. Norrland saw defendant sit up in his bed, presumably to improve his aim, before spitting. Immediately following the incident, security employed additional restraints, a chest strap and “spit mask”, to prevent any future spitting. The immediate use of appropriate restraints shows security contemporaneously perceived the spitting as an intentional act, distinct from accidental or incidental spitting. Further, the spitting incident fits into the pattern of belligerent and combative behavior defendant displayed upon arrival at the hospital placing his intentional spitting well within the context of his other behavior.

The evidence above, when viewed in the light most favorable to the State, allows a reasonable jury to conclude defendant intentionally spit in Nurse Zinchenko face while receiving medical care. Therefore, defendant’s conviction should be affirmed.

2. THE STATE HAS NOT REQUESTED AN AWARD OF APPELLATE COSTS AND THIS COURT HAS THE DISCRETION TO AWARD THEM IF A COST BILL IS FILED.

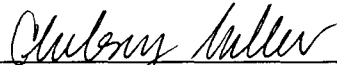
The State has not yet requested an award of appellate costs. The State agrees with defendant that this court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). Should the State prevail in this appeal and file a cost bill, defendant may object to the cost bill. The decision of whether to award appellate costs is the prerogative of this court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests defendant's sentence be affirmed.

DATED: January 5, 2017.

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